

CANADA / JUDGMENT

Stewart v. Stewart

2002 BCSC 674

COURT

Supreme Court of British Columbia

DECIDED

24 May 2002

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

Source record

2002 BCSC 674

Citation:	Stewart v. Stewart
Date:	20020524 2002 BCSC 674
Docket:	A872467 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	MATTHEW CHARLES STEWART PLAINTIFF
AND:	JULIETTE HELEN STEWART DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE MADAM JUSTICE SINCLAIR PROWSE

Counsel for Plaintiff/Respondent

J. Bode

Counsel for Defendant/Applicant

L.R. Cruickshank

Date and Place of Hearing/Trial:

April 16, 2002

Vancouver, BC

NATURE OF THE PROCEEDING AND RELIEF SOUGHT

- [1] The parties were divorced about 14 years ago after 27 years of marriage. At the time of their divorce, their family assets were divided in accordance with an agreement that they had reached. This agreement was incorporated into a Court Order dated September 19, 1988.
- [2] Since Mr. Stewart's retirement a few years ago, a dispute has arisen regarding the interpretation of the term pertaining to the division of his pension.
- [3] This hearing pertained to that dispute. Mrs. Stewart sought, if necessary, a rectification or variation of that term in order to reflect the true intention of the agreement that she and Mr. Stewart had reached regarding the division of that family asset.
- [4] In addition, although initially Mrs. Stewart had also sought an Order that she be designated as an irrevocable beneficiary of the survivor's benefits of that pension, that application was adjourned generally at the beginning of this hearing at her request.

(II) ISSUES

- [5] The term in the September 19, 1988 Order, which was the subject of this hearing, is worded as follows:

The Defendant [Mrs. Stewart] is entitled to a one-half (1/2) interest in that fraction of the Plaintiff's [Mr. Stewart's] pension plan with Molson Breweries, of which 19.7 years (the number of years of cohabitation of the parties when the pension was in effect) is the numerator and the number of years worked by the Plaintiff [Mr. Stewart] is the denominator, multiplied by the monthly pension amount or benefit.

- [6] The dispute pertained to the denominator of this formula, and in particular as to the meaning that the parties intended that the phrase the "number of years worked" was to have.
- [7] To put this dispute in context, Mr. Stewart contributed to this pension for many, but not all, of the years that he worked for Molson Breweries.
- [8] Mrs. Stewart contended that the agreement that she and Mr. Stewart had reached was that the division was to be done in accordance with the Rutherford Formula, and that therefore the phrase "the number of years worked" was intended to mean "the number of years worked while contributing to the pension". Put in other ways, it was intended to mean "the number of years worked when the pension was in effect", and "the number of years of creditable or pensionable service worked".
- [9] Mr. Stewart, on the other hand, submitted that the agreement was that the denominator was the number of years that he worked at Molson Breweries, including the years of non-pensionable service.
- [10] The issues raised in this application were:
 - (1) What was the agreement of the parties regarding the division of Mr. Stewart's pension?

- (2) Was the true intention of that agreement reflected in the September 19, 1988 order?
- (3) If not, what is the appropriate remedy?

(III) BACKGROUND CIRCUMSTANCES

- [11] The parties married on September 30, 1961. Approximately a year later in October 1962, Mr. Stewart began to work for Willmon's Trucking (a company that did deliveries for Molson Breweries).
- [12] When Mr. Stewart commenced this employment with Willmon's Trucking, the company did not have a pension plan for its employees. However, five and one-quarter years later (namely in January 1968), it acquired one and Mr. Stewart began to make contributions.
- [13] Eight years later, that is, in 1975, Molson Breweries took over Willmon's Trucking. From that time forward, as far as his employment and pension records were concerned, Mr. Stewart was treated as if he had been employed for Molson Breweries for the preceding 13 years and as if he had been contributing to the Molson Breweries pension plan for about eight years of that time.
- [14] This incorporation of his employment and pension history at Willmon's Trucking into his employment and pension history with Molson Breweries is reflected in Mr. Stewart's Personal Pension Statement from Molson Breweries. That is, on that statement, his date of hire is recorded as being October 22, 1962, which is the date that he was hired by Willmon's Trucking, and his entry date to the Molson Pension Plan is January 1, 1968, which is the date that Willmon's Trucking started its company pension plan, and the date at which he started to make contributions.
- [15] The parties separated in August 1987.
- [16] On August 5, 1988, Mrs. Stewart's Counsel made a written Offer To Settle the division of family assets claims which included a proposal that "Mrs. Stewart's interest in her husband's pension to be determined according to the Rutherford Formula".
- [17] On August 10, 1988, during Mrs. Stewart's examination for discovery, the parties reached a settlement with respect to the division of many, but not all, of their family assets. Mr. Kieran's read this agreement into the record. As far as Mr. Stewart's pension is concerned, the transcript of those Minutes of Settlement reveal that "the parties have agreed that Mr. Stewart's pension will be divided in accordance with the Rutherford Formula ...".
- [18] Although some modifications were subsequently made to other aspects of that Settlement, there were no modifications made regarding Mr. Stewart's pension. (See the letter from Mrs. Stewart's Counsel dated September 13, 1988).

- [19] Confirmation of their agreement, including that Mr. Stewart's pension be divided as set out in the Minutes of Settlement was given by both of the parties in a letter written by Mrs. Stewart's Counsel dated September 16, 1988. Each of the parties acknowledged that they agreed to settle in the terms set out in that letter as each of them signed it as "APPROVED AND ACCEPTED AS A FULL AND FINAL SETTLEMENT".
- [20] On September 19, 1988, the parties were granted a divorce. In addition, a Consent Order was made regarding the division of the parties' family assets, the division being the Settlement that the parties reached.
- [21] Although the Consent Order was made on September 19, 1988, the actual Order was not finalized for a few months. Mrs. Stewart's lawyers, and in particular, Ms. Zahorodna, in consultation with Mr. Kierans, drafted this Order.
- [22] As far as the term pertaining to Mr. Stewart's pension was concerned, the term (as was set out earlier in the Judgment) put in the Order is as follows:

The Defendant [Mrs. Stewart] is entitled to a one-half (1/2) interest in that fraction of the Plaintiff's [Mr. Stewart's] pension plan with Molson Breweries, of which 19.7 years (the number of years of cohabitation of the parties when the pension was in effect) is the numerator and the number of years worked by the Plaintiff [Mr. Stewart] is the denominator, multiplied by the monthly pension amount or benefit.

- [23] Because Mr. Stewart's pension was going to continue to have contributions made to it, the parties recognized that when his pension did vest, only a portion of it would be a family asset. Specifically, only the portion acquired during the parties' marriage was a family asset. The purpose of the numerator and the denominator in this formula is to calculate the portion of the pension that is a family asset.
- [24] Originally, Ms. Zahorodna had drafted this term using 25 years as the numerator. (This was the number of years that Mr. and Mrs. Stewart had been cohabiting while he was working at Molson Breweries before they divorced.) As she explained in her affidavit, Ms. Zahorodna had mistakenly understood that Mr. Stewart had been making contributions to his pension throughout his employment with Molson Breweries.
- [25] In a letter dated October 28, 1988, Mr. Kierans pointed out that that number should be changed from 25 to 19.7 years as that "is referred to in both appraisals on Mr. Stewart's pension and, in fact, this is the number of years that the parties cohabitated while the pension was in effect."
- [26] Actuarial appraisals had been made as to the valuation of Mr. Stewart's pension. The only actuarial report tendered in these proceedings was that of Mr. Karp dated March 3, 1988. In that report, as under the Molson Breweries pension plan, the value of the pension benefit is based on years of contribution - that is, the years of pensionable service, being the time period that should be considered when calculating the benefit to be paid to Mrs. Stewart. This opinion was incorporated into the Order as the numerator was to be "the number of

years of cohabitation of the parties when the pension plan was in effect".

- [27] Because 19.7 was the number of years that the parties had cohabited when the pension had been in effect, the change was made. Neither party appeared to consider whether any changes needed to be made to the denominator. In her affidavit, Ms. Zahorodna explained that there was no need to change the denominator as throughout it had been understood that it "represented the total number of years worked while the pension was in effect". (Emphasis added.) Mr. Kierans has since retired from the practice of law and could not be located. Therefore, there was no evidence from him as to his recollection of the reason that the denominator was not changed.
- [28] Seven years after this Order was made, namely, in 1995, Mr. Stewart took early retirement. At the time that he retired, Mr. Stewart had worked for 33 years and had contributed to his pension for 27.75 of those years.
- [29] To calculate Mrs. Stewart's interest in his pension benefit, Mr. Stewart used 33 (the total number of years that he worked for Molson Breweries including the five and one-quarter years that he was not contributing to his pension) as the denominator and 19.7 as the numerator (the years that they had cohabited while he was contributing to his pension).
- [30] Immediately, Mrs. Stewart notified him that in her view he was using the wrong denominator and that it should be 27.75 years. Over the next six and one half years, although the parties were able to resolve other disputes that arose with respect to the pension benefit that Mr. Stewart was paying to Mrs. Stewart, they were not able to resolve this issue.
- [31] Consequently Mrs. Stewart made this application.

(IV) DECISION

- [32] As was mentioned earlier in this Judgment, there are three issues to be addressed, namely:
- (1) What was the agreement of the parties regarding the division of Mr. Stewart's pension?
 - (2) Was the true intention of that agreement reflected in the September 19, 1988 order?
 - (3) If not, what is the appropriate remedy?
- (A) What Was The Agreement Of The Parties Regarding The Division Of Mr. Stewart's Pension?
- [33] With respect to the agreement between the parties, for reasons which are set out later in this Judgment, I am satisfied that the true intention of the parties was that Mr. Stewart's pension be divided in accordance with the Rutherford Formula.
- [34] The Rutherford Formula was designed to calculate the benefit to be paid from the pension of the contributing spouse to the non-contributing spouse when some, but not all, of that pension was a family asset.

- [35] This Formula is composed of three elements - namely, the interest of the non-contributing spouse in this family asset (in this case the parties agreed that Mrs. Stewart had a half interest) multiplied by the portion of the pension that is a family asset, multiplied by the amount of the pension benefit.
- [36] The function of the numerator and the denominator in this Formula is to calculate the portion of the pension that is a family asset.
- [37] Generally, the method used to calculate the numerator and the denominator is that the numerator is the period of recognized pensionable service (the period of contributions to the pension) up to the valuation date set by the Court, and the denominator is the total recognized pensionable service (the total period of contributions to the pension) up to retirement. See *Rutherford v. Rutherford* (1981), 23 R.F.L. (2d) 337 (B.C.C.A.) and *Mailhot v. Mailhot* (1988), 32 B.C.L.R. (2d) 109 (C.A.). See also s.6(2) of the Division of Pensions Regulation to Part 6 of the FRA, B.C. Reg. 77/95 which was explained in *Park v. Park*, 2000 BCCA 92, at para. 7, and which incorporated the Rutherford Formula into statutory form.
- [38] However, before applying this general method to calculate the numerator and denominator in a particular case the Court must consider the circumstances of that case and determine if the application of this method of calculating these elements of the Formula will achieve a fair division of this family asset or whether it will be necessary to depart from that method to achieve fairness. Achieving a fair division is the purpose of the Rutherford Formula. See *Rutherford v. Rutherford*, supra.
- [39] Included in the circumstances to be considered in determining whether the general method of calculating the numerator and the denominator will achieve fairness is the method used by the pension plan to calculate the pension benefit. See *Rutherford v. Rutherford*, supra, and *Jiwa v. Jiwa* (1994), 93 B.C.L.R. (2d) 377 (S.C.).
- [40] In both of these cases, the Court departed from the general method to achieve fairness. For example, in *Jiwa*, the Court used credited years rather than calendar years, as that was the method used by the pension plan and as the use of calendar years would effectively result in a reapportionment. In *Rutherford*, the Court recalculated the years of contribution, limiting them to the years of involuntary contributions. (Mr. Rutherford had made voluntary contributions to his pension after he and Mrs. Rutherford separated). The effect of these payments was that it appeared that he had contributed for more years during their cohabitation than he actually had. Fairness was achieved by using only the involuntary contributions to calculate the numerator and denominator.)
- [41] In addition, it is apparent upon reviewing such cases as *Rutherford*, *Jiwa*, and *Mailhot*, that, at the very least, to achieve fairness, the basis of the numerator has to be the same as the basis for the denominator. That is, if the numerator is calculated on the basis of years of contribution, the denominator must be calculated on the same basis. If the denominator is calculated on the years of employment (including years in which no contributions was made) then, in fairness, the numerator must also be calculated on the same basis. In other

words, regardless of the basis that is used to achieve fairness, the numerator has to be the same as the denominator.

- [42] Applying that general method of calculating the numerator and denominator to the facts in this case, the numerator does not need to be changed as it is already calculated in terms of the years that the pension was in effect - that is, the years that Mr. Stewart was contributing to the pension. The denominator, however, should be changed from the total number of years that Mr. Stewart worked at Molson Breweries to the number of years that he worked there while his pension was in effect (that is, the number of years that he contributed to his pension).
- [43] As far as fairness is concerned, the application of this general method of calculating the numerator and the denominator will achieve that end in the circumstances of this case.
- [44] Using the number of years of pension contribution as the denominator, which is the method used in Mr. Karp's actuarial report and also in the pension documents, Mr. Stewart's pension plan benefit is calculated on the basis of years of pensionable service - namely, years of contribution. The Pension Plan Retirement Statement uses the term pensionable/credited service. Mr. Stewart's pension is not calculated on the basis of number of years of work. His pensionable/credited service years do not start from the date of hire, but rather they start on the date that he began to contribute to his pension plan.
- [45] Although years of work are a factor to be considered in determining eligibility for early retirement under Mr. Stewart's pension plan, years of work are not a factor in determining the amount of the pension benefit to be paid to him.
- [46] Given that under his pension plan his benefit is calculated on the basis of years of pensionable/credited service, applying the principles of fairness underlying the Rutherford Formula, years of pensionable/credited service should be the denominator. That is, the denominator should be the number of years worked when the pension was in effect - in other words the years of pensionable/credited service.
- [47] Given these circumstances, fairness would be achieved by the application of the general method of calculating the numerator and the denominator. That is, both should use the measurement of years that the pension was in effect - the numerator being the years that the parties cohabited while the pension was in effect and the denominator being the years that Mr. Stewart worked while the pension was in effect. To use the present formula, as interpreted by Mr. Stewart, is unfair as it effectively reapportions this family asset in his favour. Such a division is not in accordance with the Rutherford Formula, and therefore it is not in accordance with the agreement reached by the parties.

- [48] With respect to the reasons why I am satisfied that the parties had agreed that Mr. Stewart's pension was to be divided in accordance with the Rutherford Formula, that conclusion was consistent not only with the evidence of Mrs. Stewart and Ms. Zahorodna, but more significantly, it was consistent with all of the documentary evidence submitted in this hearing, including the actuarial report of Mr. Karp.
- [49] That is, the written Offer that Mrs. Stewart made to Mr. Stewart to settle on August 5, 1988, was that this family asset be divided in accordance with the Rutherford Formula.
- [50] As the transcript of the Minutes of Settlement disclose, this Offer was accepted by Mr. Stewart on the August 8, 1988, that is, "the parties have agreed that Mr. Stewart's pension will be divided in accordance with the Rutherford Formula..."
- [51] Three days before the Consent Order was made, in a letter dated September 16, 1988, the parties confirmed this agreement by each signing this letter acknowledging "APPROVED AND ACCEPTED AS A FULL AND FINAL SETTLEMENT".
- [52] Although Mr. Stewart contended in his affidavit that the parties had agreed to depart from the Rutherford Formula, that contention was not supported by the evidence.
- [53] In particular, in his affidavit Mr. Stewart attested that:
- [W]ith respect to the Rutherford formula, it was clear at all times that this was a useful tool, convenient for referring to an approach to dealing with pension division. I am not a lawyer, but it was clear in discussions at the time, when we reviewed the actuarial reports and resolved the pension matters, that we were dealing with years worked, not years of contribution. ..."Years worked" were what gave rise to the total pension benefit. While the exact figures were not known until I retired in 1995, the principles were known in 1988 and this language was deliberately chosen to address the benefit of the 5 non-contributory working years.
- [54] The only actuarial report submitted in these proceedings was that of Mr. Karp, tendered by Mr. Stewart. In that report Mr. Karp did not use number of years worked as the basis of his evaluation of Mr. Stewart's pension. Rather, he used the number of years of pensionable service as his basis. Although he did refer to "years of work" in one portion of his report, it was for the limited purpose of setting out Mr. Stewart's eligibility for retirement, as the basis for valuing his pension. His report is consistent the interpretation of Ms. Zahorodna as to the meaning to be given to the denominator. The use of years of pensionable service as the basis of valuation is consistent with Mr. Stewart's Pension Plan Retirement Statements which refer to years of credited/pensionable service in calculating the value of his pension.
- [55] In her affidavit, Ms. Zahorodna testified that throughout it was understood that the denominator represented the number of years when the pension was in effect.
- [56] Although in his letter requesting that the numerator be changed to 19.7, there was nothing to suggest that Mr. Kierans considered that the pension was to be divided other than in accordance with the Rutherford Formula.

- [57] Rather, given the absence of any evidence that the agreement had changed, it is probable, in my view, that Mr. Kierans interpreted the denominator in the same manner as Ms. Zahorodna, as that interpretation was in keeping with the agreement to divide the pension in accordance with the Rutherford Formula.
- [58] Moreover, Mr. Karp's report was written on March 3, 1988, well before the parties reached their Settlement. This report was written to Mrs. Stewart, but tendered in these proceedings by Mr. Stewart, demonstrating that Mr. Stewart had been given a copy of it. I accept Mr. Stewart's contention that the Settlement regarding the pension was intended to incorporate the opinion of Mr. Karp. As was set out in the preceding paragraphs, it was Mr. Karp's opinion that the pension be calculated in terms of pensionable service years - that is, in terms of when the pension was in effect.
- [59] For all of these reasons, I have concluded that the true intention of the parties was to divide Mr. Stewart's pension in accordance with the Rutherford Formula, and that division would result in the denominator be calculated as the number of years worked when the pension was in effect.
- [60] Although it was unfortunate that Mr. Stewart's former lawyer was not available to provide affidavit evidence of his recollection of events, Mr. Stewart was not prejudiced in these proceedings by that fact, as my decision was primarily founded on the documents drawn at the time rather than the recollection of Mrs. Stewart's Counsel.

(B) Were The True Intentions Of The Parties Reflected In The September 19, 1988 Order?

- [61] The true intention of the parties was that the pension be divided in accordance with the Rutherford Formula.
- [62] As has been amply demonstrated by these proceedings, the present wording of the phrase describing the denominator is imprecise as it simply describes it as the number of years worked rather than the number of years worked when the pension was in effect.
- [63] Because of this imprecision, this phrase is subject to misinterpretation and therefore does not accurately reflect the true intention of the parties.

(C) If The Order Does Not Reflect The True Intention Of The Parties, What Is The Appropriate Remedy?

- [64] Pursuant to Rule 41(24):

[T]he Court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter which should have been, but was not adjudicated upon.

- [65] Under this Rule, the Court can correct:

the product of a mental lapse experienced by someone drafting an order. The slip results from imprecision, inattention or some such mental quirk. The rule is remedial, to take cognizance of that quirk, and to forgive it, should it be necessary in the interest of accurately expressing the true intent of the order as an accurate reflection of the reasons for judgment.

See: O.E.X. Electromagnetic Inc. v. Coopers Lybrand , [1993] B.C.J. No. 1459 (QL) (S.C.) at para. 9.

- [66] This Rule permits the Court to rectify an Order to give effect to the true intention of the parties, even in the situation where there has been a clear omission, to include a term that was to be included by the agreement of the parties. See *Dalziel v. Dalziel* (1977), 3 B.C.L.R. 73 (S.C.) and *Pankiw et al v. Pankiw et al* (1986), 32 D.L.R. (4th) 53 (S.C.).
- [67] In the present case, the true intention of the parties was to divide this family asset in accordance with the Rutherford Formula. As applied to the pension term of this Order the denominator should be described as the number of years worked when the pension was in effect. As was set out in the preceding section, the term was imprecisely drawn and does not reflect that intention.
- [68] Given these circumstances, I will exercise my discretion under Rule 41(24). The imprecision of this term will be corrected to accurately reflect the true intention of the parties by adding the words "while the pension was in effect" to para. O 1. on pg.7 of the September 19, 1988 Order, after the word "Plaintiff" and before the word "is" in the second last line of that paragraph.
- [69] Mr. Stewart contended that if he has misinterpreted this Order (which I have concluded that he did), the Order correcting or rectifying his mistake should take effect as of the date of the correction or rectification rather than the date of his retirement in 1995, otherwise he is significantly prejudiced as there will be a significant amount of money owing to Mrs. Stewart.
- [70] I am not satisfied that I have the jurisdiction to make the Order sought by Mr. Stewart. That is, this Order was in essence an agreement made between the parties. Mr. Stewart breached that agreement by failing to pay the money that he had agreed to pay to Mrs. Stewart.
- [71] To grant the Order sought by Mr. Stewart is tantamount to changing the terms of that agreement. I am not satisfied that I have the jurisdiction to grant that type of Relief.
- [72] In any event, if I do have the jurisdiction to make such an Order, I would not make it in the circumstances of this case. That is, if the jurisdiction exists it would no doubt be a discretionary power arising from my inherent jurisdiction.
- [73] As with the exercise of any of my discretionary powers, it must be exercised to do justice between the parties.

- [74] In this case, since 1995 Mr. Stewart has had the use of monies that belonged to Mrs. Stewart. From the onset, he has been aware of her position that these monies belonged to her. Although, for a variety of reasons, there was a delay in bringing on this application, Mr. Stewart was not caught by surprise.
- [75] Because he had notice of this dispute from the beginning, Mr. Stewart could have put the monies claimed by Mrs. Stewart aside until the matter was resolved. He chose not to do so.
- [76] Given these circumstances, any prejudice that Mr. Stewart may now suffer is of his own making.
- [77] It is because of all of these circumstances that I have decided that if I had the jurisdiction to grant the relief sought by Mr. Stewart, I would not do so.
- [78] For all of these reasons, the application of Mr. Stewart to have the original Order corrected as of the date of this Judgment, as opposed to the date on which it was made (that is, September 19, 1988) is dismissed.

(V) COSTS

- [79] As the successful party, Mrs. Stewart is awarded costs, those costs to be calculated at Scale 3.

"J. Sinclair Prowse, J."

The Honourable Madam Justice J. Sinclair Prowse

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/02/06/2002bcsc0674.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/stewart-v-stewart-2002-bcsc-674>

Prepared on 26 October 2026 · Esheria